Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY,

PETITIONER,

v.

MAGRANE–HOUSTON COMPANY,

RESPONDENT.

ETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ETITION, TABLE OF CONTENTS OF:

STATEMENT: PAGE

(1) Nature of Action 1

(2) Grounds of Defence 2

(3) Section 3 of the Clayton Act 2

(4) Contract in Question Valid under the Clayton Act whether Contract of Sale or of Agency 3

(5) Number of Agencies 3

(6) No Evidence that Contract tended to lessen Competition or create a Monopoly, or is likely to have such Tendency in the Future 4

(7) Decision not based on any Controverted Question of Fact 4

PAGE

(8) Decision in District Court based on Face of Contract without any Reference to Surrounding Circumstances or the Absence of Evidence to show that Contract tended to lessen Competition or create a Monopoly 5

(9) Decision of Circuit Court of Appeals on Ground that Contract violated Clayton Act; Opinion of Brown, J., disagreeing with this Conclusion on the Ground that full Weight must be given to Final Clause of Section 3 5

(10) Decision contrary to Uniform Current of Judicial Authority 6

(11) Majority of Court relied on Statements in Congressional Committee reports not addressed to Bill as passed and therefore were misled 6

(12) Majority held that Plaintiff was entitled to relief if Clayton Act did not invalidate Contract 6

REASONS URGED FOR ALLOWANCE OF WRIT:

(1) Majority of Court disregarded last Clause of Section 3 of Clayton Act and misconstrued Section as a whole 7

(2) Majority of Court by decision invalidates 6,000 of Plaintiff's Contracts and 46,000 of Plaintiff's Competitors' Contracts . 7

(3) Similar Covenants in Plaintiff's Competitors' Contracts prevent Plaintiff's Contracts from having Tendency to lessen Competition or create a Monopoly . . 7

(4) Majority of Court erroneously determined Contract one of Sale instead of Agency, 7

PAGE

(5) Decision as to effect of Section 3 of Clayton Act on Similar Contracts makes Question one of Public Interest 7

(6) Uncertainty as to Application of Clayton Act to Contracts of this Character should be ended 7

(7) Decision is in conflict with Decisions of other Federal Courts, and Courts of Last Resort in Many States as to Presumptive Effect of Contracts of this Nature upon Competition 7

(8) Court was misled by Statements in Reports of Committees not addressed to Clayton Act as passed 8

(9) Decision contrary to Uncontradicted Fact that Contract did not substantially lessen Competition or tend to create a Monopoly 8

EXHIBIT:

A. The Contract in Question 8

BRIEF IN SUPPORT OF THE FOREGOING PETITION, CONTENTS OF:

INTRODUCTION:

PAGE

I. The Circuit Court of Appeals put its Decision entirely on the Ground that the Contract was invalid under section 3 of the Clayton Act 11

(*a*) The court agreed with the plaintiff that at the time suit was commenced the contract had not been terminated, 11

(*b*) The court agreed with the plaintiff that it was entitled to an injunction when the suit was commenced unless the negative covenant was invalidated by section 3 of the Clayton Act, 12

(*c*) The court was of opinion that the expiration of the contract during the pendency of the suit did not deprive the court of jurisdiction to accord such relief as was proper 12

II. The Court made no Findings of Fact. The Case is not one where any Controversy of Fact is involved 13

III. The Court reached the Conclusion as to the effect of the Clayton Act by a Misinterpretation of the Limitation found in the Proviso which makes invalid only those Contracts "where the Effect . . . may be to substantially lessen Competition or tend to create a Monopoly in any Line of Commerce" 13

ARGUMENT:

A. THE FACTS: PAGE

I. Preliminary Statement 16

II. The Complete Absence of Evidence that this Contract or this Form of Contract has tended to lessen Competition or to create a Monopoly or might have such Tendency 18

III. The Reason for the Custom of Restricting Local Dealers to one make of Patterns and its Advantages 23

IV. The Nature of the Contract now before the Court 25

B. THE LAW:

I. The Reasons for asking this Court to review the Case 28

II. There was no Evidence that the Contract tended to substantially lessen Competition or to create a Monopoly within the Meaning of the Clayton Act . . . 29

III. The Decisions of the Courts below give an Effect to Section 3 of the Clayton Act which in view of the State of the Law at the Time of its Passage Congress cannot have intended 41

IV. The Contract is in Reality one of Agency to which Section 3 of the Clayton Act is not applicable at all 50

V. Such Decisions as have been made under Section 3 of the Clayton Act sustain the Plaintiff's Position 55

VI. The Price Maintenance Clause of the Contract is Valid, but the Question of its Validity or Invalidity is not Material 59

VII. Although the Time for an Injunction has expired, the Plaintiff is entitled to Relief in Equity 61

CASES CITED

PAGE

Automobile Ins. Co. v. *Guaranty Securities Corp.*, 240 Fed. 222 62
Boston Store v. *American Graphophone Co.*, 246 U. S. 8 . 60
Brown v. *Rounsavell*, 78 Ill. 589 44
Butterick Publishing Co. v. *Fisher*, 203 Mass. 122 . . 4, 18, 43, 44, 61
Butterick Publishing Co. v. *Rose*, 141 Wis. 533 . . 4, 43, 61
Chicago & A. Ry. Co. v. *N. Y., L. E. & W. R. Co.*, 24 Fed. 516, 62
Chicago Board of Trade v. *United States*, 246 U. S. 231 . 5, 38
Coca Cola Co. v. *J. G. Butler & Sons*, 229 Fed. 224 . . . 56
Cole Motor Car Co. v. *Hurst*, 228 Fed. 280 42
Consumers' Albany Brewing Co., In re, 224 Fed. 235 . . 62
D. R. Wilder Mfg. Co. v. *Corn Products Refining Co.*, 236 U. S. 165 41
Elliott Machine Co. v. *Center*, 227 Fed. 124 56
Ferris v. *American Brewing Co.*, 155 Ind. 539 44
Ford Motor Co. v. *Benj. E. Boone, Inc.*, 244 Fed. 335 . . 59
General Elec. Co. v. *Westinghouse Elec. Co.*, 151 Fed. 664, 62
Goddard v. *Wilde*, 17 Fed. 845 62
Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 224 Fed. 566; 227 Fed. 46 58
Green, In re, 52 Fed. 104 43
Harrison v. *Glucose Sugar Refining Co.*, 116 Fed. 304 . . 62
Javierre v. *Central Altagracia*, 217 U. S. 502 62
J. W. Ripy Co. v. *Art Wall Paper Mills*, 41 Okla. 29 . . . 44
Montgomery Light Water & Power Co. v. *Montgomery Traction Co.*, 219 Fed. 963 62
Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed. 398; 243 U. S. 502 . . . . . 56, 57
Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich. 158 . . . . . 4, 43, 46, 61

PAGE

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed. 206 . . . . . 56, 58
Reece Folding Machine Co. v. *Earl & Wilson*, 205 Fed. 539, 62
Rose v. *Gordon*, 158 Wis. 414 . . . . . 48, 49
Singer Machine Co. v. *Union Buttonhole Co.*, Fed. Cas. No. 12904 61
Southern Fire Brick & Clay Co. v. *Garden City Sand Co.*, 223 Ill. 616 44
Sperry & Hutchinson Co. v. *Fenster*, 219 Fed. 755 . . . 56
Standard Fashion Co. v. *Siegel Cooper Co.*, 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121 . . . . . 4, 43, 61
Staroske v. *Pulitzer Publishing Co.*, 235 Mo. 67 48
Sullivan v. *Rime*, 35 So. Dak. 75 . . . . . 4, 46
Texas Co. v. *Central Fuel Oil Co.*, 194 Fed. 1 62
Tillar v. *Cole Motor Car Co.*, 246 Fed. 831 43
United States v. *United Shoe Machinery Co.*, 227 Fed. 507; 234 Fed. 127 56
Walsh v. *Dwight*, 40 App. Div. 513 45
Walter A. Wood, etc., Co. v. *Greenwood Hardware Co.*, 75 S. C. 378 48
Weiboldt v. *Standard Fashion Co.*, 80 Ill. App. 67 . 4, 46, 53
Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454 . . . 43
Willcox & Gibbs Sewing Machine Co. v. *Ewing*, 141 U. S. 627 . . . . . 3, 28, 53
W. T. Rawleigh Med. Co. v. *Osborne*, 177 Ia. 208 48

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Standard Fashion Company, respectfully represents:

First. Your petitioner, a New York corporation engaged for the past 30 years in manufacturing and selling patterns for women's and children's garments and publishing periodicals and catalogues illustrating the clothing to be made from such patterns, brought a bill in equity on July 25, 1917, in the United States District Court for the District of Massachusetts against the respondent, a Massachusetts corporation conducting a retail dry goods store in the city of Boston, the jurisdic-

tion being dependent on diverse citizenship, to restrain it from violating the clause of its agency contract with the petitioner (which then had at least 19 months to run) by which it had agreed not to sell or permit to be sold on its premises during the term of the contract any other patterns than those made by the petitioner; and, the respondent having already broken the contract by ceasing to handle the petitioner's patterns and by undertaking to sell in place thereof patterns made by the McCall Company, a competitor of the petitioner, the bill contained a prayer for such damages as might be ascertainable. A copy of the material portion of the agency contract in question is hereto annexed marked "A."

Second. The respondent asserted the right to break the contract on the ground that the clause above referred to rendered the contract illegal and void under section 3 of the Clayton Act, and upon this ground alone sought to justify its conduct in terminating the sale of the petitioner's patterns before the end of the contract period and undertaking the sale of competing patterns.

Third. Section 3 of the Clayton Act (Act of Oct. 15, 1914, c. 323; 38 Stat. 731) is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the district of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for

sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Fourth. The petitioner contended that if the contract between it and the respondent was to be treated as a contract of sale within the meaning of the foregoing section, it was valid because there was no evidence whatever that it might substantially lessen competition or that it tended to create a monopoly; and secondly, the petitioner contended that the contract was in substance one of agency (as was decided with reference to a similar contract in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627), and hence was not within the scope of this section.

Fifth. It appeared from the undisputed evidence that there are about 52,000 pattern agencies of this nature in the United States, distributed among the various companies which manufacture similar patterns; that the petitioner has about 6,000 agencies, and the Butterick Publishing Co. and the New Idea Co. the capital stock of which, together with that of the petitioner, has for many years been owned by a certain holding company, but which nevertheless transact business entirely independently of each other and without any contracts or arrangements between them, have between them about 14,000 agencies; that the McCall Company has some 12,000 and several other competing companies the remainder; that in all of the 52,000 contracts under which these agencies exist, except a few hundred, there is a clause by which the local dealer agrees not to handle other makes of patterns; that the petitioner's patterns are sold invariably as Standard patterns, either through local dealers or direct to the consuming public; that no other patterns are sold by that name; and that there is a valuable goodwill associated with the trade name or trade mark.

Sixth. It further appeared by uncontradicted evidence that the long-standing custom in the pattern business of restricting the local dealers maintaining agencies for the sale of patterns to one make of patterns grew out of the peculiar nature of the pattern business, which made it advantageous alike to the manufacturer, the local dealer and the public, agreements like that in question here having been sustained in many courts (*Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122; *Standard Fashion Co.* v. *Siegel Cooper Co.,* 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121; *Butterick Publishing Co.* v. *Rose,* 141 Wis. 533; *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.,* 171 Mich. 158; *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67; *Sullivan* v. *Rime,* 35 S. Dak. 75).

That in the history of the business it has not tended to restrain competition or create a monopoly, but that on the contrary the number of pattern manufacturers has greatly increased under this custom and competition has grown more and more keen; that all of the various pattern manufacturers, except one, have agencies in the retail district of Boston within 750 feet of the respondent's store, the McCall Company which induced the respondent to break its contract with the petitioner now having three such agencies as against the petitioner's one.

No evidence was offered that this clause in pattern agency contracts has anywhere tended to suppress competition or to create a monopoly, or is likely to have such tendency in the future, or that any pattern company has ever had or is likely to have difficulty in securing suitable agencies either in Boston or anywhere else.

Seventh. There was no conflict in the testimony and the decision of the case by the courts below did not involve any question of fact depending on conflicting evi-

dence or on any peculiar circumstances existing in the case; there is involved merely the construction of section 3 of the Clayton Act and its application to undisputed facts.

Eighth. In the District Court Judge Johnson held that the contract was void on its face under section 3 of the Clayton Act, without any reference to the surrounding circumstances or the absence of any evidence tending to show a tendency on the part of the contract to restrain competition or create a monopoly. In effect the judge disregarded the last clause of the section, and his ruling, if correct, necessarily strikes down all the rest of the petitioner's 6,000 agency contracts as well as nearly all of the other 46,000 pattern agency contracts in this country, as well as a multitude of similar contracts in other branches of industry. The question is consequently one of great public interest.

Ninth. From the final decree entered on Mar. 13, 1918, the petitioner appealed to the Circuit Court of Appeals for the First Circuit. On June 28, 1918 that court announced its decision by a *per curiam* opinion, holding that the petitioner's remedy, if any, was on the law side of the court and declining to pass upon the validity of the contract under the Clayton Act. Thereafter a rehearing was granted upon the application of the petitioner and the case was again fully argued. On June 28, 1919, the court announced its decision, withdrawing entirely from the position taken by it in the earlier opinion, and affirming the decree of the District Court on the ground that the negative covenant violated the Clayton Act. On this question District Judge Brown dissented, expressing the opinion that full weight must be given to the final clause of section 3 of the Clayton Act, saying that this clause should be interpreted according to the principles stated in the opinion of Mr. Justice Brandeis

in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; that Congress evidently did not intend to "make a contract of this character void upon its face" or to bring about "an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect"; and that there was nothing whatever in the record in this case to justify a finding that the contract in question tended to suppress competition or create a monopoly.

Tenth. The decision of the court below runs counter to the practically uniform current of judicial authority with respect to the presumptive effect upon competition of contracts of this character, and is at variance with the decisions of other federal courts as to the effect of section 3 of the Clayton Act; and upon the question whether the contract is one of agency is in conflict with the decision of this court in the case referred to in paragraph Fourth hereof.

Eleventh. In deciding this case the majority of the court below relied on statements in the reports of the committees of the House and Senate which were not addressed to the Act as it passed Congress and thereby were misled as to the applicability of the Clayton Act to the contract here.

Twelfth. With respect to the right of the plaintiff to a decree if the covenant in question was not invalid under section 3 of the Clayton Act, the majority were in full accord with the plaintiff's position; the majority held that apart from the Clayton Act the contract was valid and the plaintiff entitled to relief; and the decision of the court below rested solely on the conclusion that the Clayton Act made the covenant invalid.

Thirteenth. Your petitioner is advised that the decision of the Circuit Court of Appeals is erroneous and your petitioner submits that the decision should be reviewed by this court for the following reasons:

1. Because the majority of the Circuit Court of Appeals, in declaring in effect that the negative covenant in this contract was invalid upon its face, in the absence of any evidence that it tended to lessen competition or to create a monopoly, completely disregarded the last clause of section 3 of the Clayton Act and misconstrued the section as a whole.

2. Because the effect of the decision of the majority of the Circuit Court of Appeals is to invalidate the 6,000 agency contracts of the petitioner and practically all of the 46,000 agency contracts of competing pattern manufacturers.

3. Because the existence of similar negative covenants in nearly all of the contracts of the petitioner's competitors prevents the clause of the petitioner's contracts from having any tendency toward monopoly or toward the substantial lessening of competition.

4. Because the majority of the Circuit Court of Appeals erroneously determined the contract in question to be a contract of sale within the meaning of section 3 of the Clayton Act, whereas it is in substance, as the petitioner contends, an agency contract not falling within the scope of this section of the Act.

5. Because the question of the effect of section 3 of the Clayton Act upon contracts of this nature, which are numbered in this country by tens of thousands, is one of very great public interest, upon which there is as yet no authoritative decision.

6. Because it is of the greatest public importance that uncertainty in the application of the Clayton Act to contracts of this kind should be ended.

7. Because the decision of the courts below in this case is in conflict with the decisions of other federal courts and with practically all the decisions of courts of last resort in the different states with respect to the pre-

sumptive effect upon competition of contracts of this nature.

8. Because in reaching said decision the court below relied on statements in the reports of the committees of the two houses of Congress which were not addressed to the Clayton Act as passed and thereby were misled as to its applicability to the contract in suit.

9. Because the decision of the court below did not involve questions of fact arising from conflicting evidence, but involved merely the erroneous conclusion that under section 3 of the Clayton Act the petitioner's contract with the respondent was invalid upon its face, regardless of the proven and uncontradicted fact that it had no tendency to substantially lessen competition or create a monopoly.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of this court to the United States Circuit Court of Appeals for the First Circuit requiring the said case, in which your petitioner is plaintiff and plaintiff in error and the said Magrane-Houston Co. is defendant and defendant in error, to be certified to this court for its review and determination.

ROBERT G. DODGE,
Attorney for the Petitioner.

CHARLES E. HUGHES,
HERBERT NOBLE,
JAMES B. SHEEHAN,
ROBERT G. DODGE,
Of Counsel.

"A"

"Mutual agreement between the Standard Fashion Company of New York, first party, and Magrane-Houston Co., of Boston, State of Mass., second party.

First Party hereby grants to second party an Agency for the sale of Standard Patterns for Their store in the City of

Boston, State of Mass., for a term of two years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver F.O.B. New York, or at its Branch Office in Boston, Mass., to second party Standard Patterns at a discount of Fifty Per Cent. from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party, at regular agents' rates; to allow second party to return discarded patterns semi-annually, between January 15th and February 15th, and July 15th and August 15th, in exchange, at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its General Office in New York.

Second Party agrees, in consideration of the above, to purchase from first party, for free distribution, Standard Fashion Sheets to a number not less than seventy-five thousand (75,000) per annum, and Handy Catalogues to a number not less than Two thousand (2000) per annum; to pay transportation charges on all goods ordered or returned under this agreement; to purchase and keep on hand at all times, except during the periods of exchange specified above, One thousand ($1000) Dollars' value in Standard Patterns at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: Dollars at time of signing this contract, and Five hundred ($500) Dollars in thirty days after shipment of stock, the balance of the purchase price Five hundred ($500) Dollars, to remain unpaid, as a Standing Credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this Standing Credit at the rate of three per cent. per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, to re-order promptly all patterns as sold, and to give the department a prominent position on the ground floor in the store.

Either Party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all Standard Patterns, bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same. Failure to require compliance with the strict letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

Dated November 25th, 1914

STANDARD FASHION COMPANY

Done at Boston State of Mass. Per ROBERT KELLY

(*First Party*)

MAGRANE-HOUSTON COMPANY

P. B. MAGRANE, *Treas.*

(*Second Party*)"

Supreme Court of the United States

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BRIEF IN SUPPORT OF THE FOREGOING PETITION

INTRODUCTION

I

The Circuit Court of Appeals put its Decision entirely on the Ground that the Contract was invalid under section 3 of the Clayton Act

(*a*) The court agreed with the petitioner (hereinafter called the plaintiff) that at the time suit was commenced the contract had not been terminated.

The court says:

"The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination. . . . We think the negative covenant (assuming for the moment it and the rest of the

contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below. . . . The plaintiff consequently admits that its right to an injunction expired on February 25, 1919" (Transcript, pp. 188, 189).

The suit was commenced July 25, 1917.

(*b*) The court agreed with the plaintiff that it was entitled to an injunction when the suit was commenced unless the negative covenant was invalidated by section 3 of the Clayton Act.

The court says:

"Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for" (p. 187).

(*c*) The court was of opinion that the expiration of the contract during the pendency of the suit did not deprive the court of jurisdiction to accord such relief as was proper.

The court says:

"The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired *pendente lite*, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court" (p. 190).

"But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain

jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages" (p. 189).

II

The Court made no Findings of Fact. The Case is not one where any Controversy of Fact is involved

(*a*) If the court will refer to the opinion, hardly a statement of fact can be found.

The court said:

"In effect the plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' . . . It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two fifths" (pp. 193, 194).

The court did not attempt to review the evidence but based its decision on pure conjectures and suppositions drawn from the face of the contract.

III

The Court reached the Conclusion as to the effect of the Clayton Act by a Misinterpretation of the Limitation found in the Proviso which makes invalid only those Contracts "where the Effect . . . may be to substantially lessen Competition or tend to create a Monopoly in any Line of Commerce"

The court said:

"The language is 'may be,' not 'is' or 'will be.' In order to condemn the negative covenant, it is not

necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly. . . . For present purposes, the fact that this section was amended in conference before final enactment we regard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports" (pp. 194, 192–193).

The House bill made every contract containing such a condition unlawful and provided for criminal punishment for making the same. The Senate rejected this and proposed to make only contracts of owners of patents containing such a condition invalid. The House refused to accede to the Senate bill and the bill went to conference. The conference rejected both the Senate and House bills and adopted the section in its present form with this proviso—"where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—and only in such case invalidated the contract.

The foregoing clearly demonstrates that there was a change in the purpose expressed in the committee reports and the court therefore in following the reports was misled as to the meaning and effect of the Act as finally passed.

The opinion of Brown, J., dissenting as to the construction of the Clayton Act, very properly says, "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon

its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect" (pp. 198–199).

ARGUMENT.

A. The Facts.

I

Preliminary Statement

The facts all appeared by undisputed testimony.

The plaintiff is a New York corporation engaged in the business of manufacturing and selling patterns and distributing periodical publications illustrating the garments to be made from such patterns (pp. 31–32). The patterns made by it have been sold since 1887 under the name of Standard Patterns throughout the United States and Canada and the name is a very valuable asset (p. 35). It sells its patterns direct to the consumer to a certain extent, but markets them in the main through about 6,000 local agents, like the respondent (hereinafter called the defendant), under contracts uniform as to form with that involved in this case. Dry goods stores where piece goods and fabrics of that kind are sold make the most desirable agencies (p. 33), and the defendant's store by reason of its location in the precise centre of the shopping district of Boston and its favorable reputation "as a great piece goods store" affords a peculiarly valuable location for an agency (p. 55).

The plaintiff's patterns have been sold in Boston for at least 28 years through different agencies (pp. 35–36).

The contract between the plaintiff and the defendant (Plaintiff's Exhibit 7, pp. 157–160) was entered into at the solicitation of the latter upon the expiration of a contract which the latter had had with the manufacturers of the Ladies' Home Journal patterns (pp. 37–38). The

plaintiff received no notice of termination from the defendant within thirty days after the expiration (on Nov. 25, 1916) of the first term of two years (p. 39), and consequently the contract was automatically extended for another term of two years and could not be lawfully terminated by either party until the expiration of three months after the end of such term, that is to say, until Feb. 25, 1919 (Opinion of Circuit Court of Appeals, p. 188).

The clause in the contract forbidding the defendant to handle other makes of patterns has been in the plaintiff's contracts for a great many years (p. 71) and in accordance with the general custom of the trade is found in nearly all the agency contracts of all the pattern manufacturers in the country (pp. 44, 56–57, 97).

On July 9, 1917, the defendant broke the contract by discontinuing altogether the sale of the plaintiff's patterns and the distribution of its advertising material and installing in its store in place thereof the patterns and advertising material of the McCall Company, one of the plaintiff's competitors (p. 41; Opinion of Judge Johnson, p. 12). It appeared that several months before, to wit, on Feb. 2, 1917, the defendant had, without the plaintiff's knowledge, made a contract with the McCall Company whereby it was to become at an early date "special agent" at Boston for the sale of McCall patterns (Plaintiff's Exhibit 17, pp. 165–168).

At the time of the breach of contract the plaintiff had but one other agency in the retail district of Boston. That agency was in the store of R. H. White Co. and the contract with that company, entered into on Feb. 7, 1917 (p. 69), contained an agreement on the part of the plaintiff that it would not maintain any other agency within a quarter of a mile of the White store except that in the defendant's store (pp. 50, 95).

Having no adequate remedy at law because of the obvious impossibility of ascertaining the full amount of its damages, the plaintiff brought this bill in equity, relying on *Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122, and similar cases, hereinafter cited. The defendant offered no justification in fact for its breach of contract, and merely claimed that section 3 of the Clayton Act invalidated the agreement.

The purpose of the suit was to maintain the plaintiff's right to continue to transact business in the same manner as it had done for many years.

II

The Complete Absence of Evidence that this Contract or this Form of Contract has tended to lessen Competition or to create a Monopoly or might have such Tendency

The principal pattern manufacturing companies conducting a business similar to that of the plaintiff are the McCall Co., the New Idea Co., the Pictorial Co., the Butterick Publishing Co., the Home Co., the Peerless Co. and the May Manton Co. All of these concerns except the May Manton Co. market their products through local agencies in substantially the same way as does the plaintiff (p. 43). By the general custom of the trade substantially all pattern agency contracts contain a clause like that in the contract between the plaintiff and the defendant, to the effect that the agent shall not handle the patterns of any other maker (pp. 44, 56–57, 97). This custom has recently been given up by the McCall Co., whose new form of contract eliminates most of the agency features of the plaintiff's contract, but of the 12,000 agencies of that Company all but 300 to 400 are still act-

ing under the old form of contract, which contains the clause in question (pp. 137–140). The representative of the McCall Co. who testified for the defendant could name no other company which has eliminated this clause from its contract (p. 140). There was undisputed evidence that very few stores in the country have handled two kinds of patterns at the same time (pp. 97–98).

No attempt was made by the defendant to show by evidence that the effect of the contract either had been in the past or might be in the future "to substantially lessen competition or tend to create a monopoly," either in Boston or anywhere else.

On the contrary it appeared without contradiction that competition in the pattern business has grown continually more and more severe, that new pattern companies have been organized and have acquired a large trade, and that there are to-day many more companies in existence and doing a larger business than was the case 20 or 30 years ago. When the plaintiff began business in Boston some 28 years ago, the only other companies in the business were the Butterick Co., the Demarest Co. and the Imperial Co. (pp. 50–51). The McCall Co. and the other large companies above referred to have been organized and started business since that time and several of them within recent years (pp. 53–55).

The plaintiff has about 6,000 agencies in the United States, and, in round numbers, the Butterick has 10,000, the McCall Co. 12,000, the New Idea Co. 4,000, the Home Co. 5,000 to 6,000 and the Pictorial Co. 6,000 to 8,000. In all there are about 52,000 pattern agencies in the United States (pp. 53–55, 131).

There was no evidence that any of the other pattern companies have ever had difficulty in establishing proper agencies in Boston. All of them except the Peerless Co.

have at least one agency in the retail district of Boston within 750 feet of the defendant's store (pp. 51, 112). The McCall Co., for example, already had three other agencies in that territory before it succeeded in establishing another with the defendant by inducing it to break its contract with the plaintiff (pp. 51, 111). At the time of the breach of the contract the plaintiff had only one other agency in the retail dry goods section of Boston (p. 52).

Instead of making monopolistic profits, the evidence showed that the plaintiff made no money at all during the last year before the trial of this case (p. 85).

Mr. Scanlon, the president of the plaintiff Company, testified without contradiction that it is not advisable and has not been the custom for a pattern company to seek a very large number of agencies in a small city or in any particular section of a large city, and he explained the reason why (p. 53). It is obvious that the obligation to take back unsold patterns sets a limit to the number of agencies which any manufacturer can profitably establish in a given locality (pp. 45–46).

The actual conditions existing at the time of the defendant's breach of its contract with the plaintiff showed the futility of the contention that the contract with the defendant tended to monopoly. The available stores in the retail district were divided among the various competing companies, each store handling patterns of one manufacturer only, under agency contracts, and there was no evidence that any pattern company was having any difficulty in marketing its product or that its business was not effectively handled by its local representative (pp. 55, 57, 100). The plaintiff itself had definitely agreed with the R. H. White Co., with which under a contract made in February, 1917, it had established its other

agency in Boston, that it would not maintain any further agency within a quarter of a mile of the White store except the one with the defendant, and the territory thus described includes the entire dry goods district of the city (pp. 50, 95). The proprietors of all the other available stores had existing contracts with other pattern companies (pp. 55, 57, 100). Hence at that time as a matter of fact the clause in question in the defendant's contract cannot have had any tendency whatever toward the lessening of competition or the establishing of a monopoly in the pattern business in Boston.

The complete absence of any evidence indicating that the contract in question tended to lessen competition or create a monopoly was the principal reason for Judge Brown's dissent from the opinion of the majority of the court on the question of the Clayton Act, and for his conclusion that the decision gives no effect to the last clause of section 3 (pp. 196 *et seq.*).

The one piece of evidence relied on by Judge Johnson in the District Court and by Judge Anderson in the Circuit Court of Appeals as tending to show a monopolistic tendency on the part of this contract, is the admitted fact that the plaintiff Company is controlled by a certain holding company which also owns the stock of the Butterick Publishing Co. and the New Idea Co. and that the three companies between them have 20,000 agencies out of a total of 52,000 in the United States. It appeared, however, that the officers of the three companies are different and that they are managed entirely as distinct concerns without any agreements among them (pp. 103–4, 131–2). There was no evidence that competition had been destroyed or lessened as between these three companies or that they had parcelled out the territory among themselves or had in any way sought to restrain trade or cre-

ate a monopoly. Nothing whatever appeared except that they had common stockholders. Furthermore, the relation between the three companies has existed for a great many years (p. 132), and there was no evidence whatever as to the number of agencies which the three companies had at the beginning of the period, or whether the number as compared with those of the other companies had increased or diminished during the period, or that the situation had been in the slightest degree affected by the exclusive feature of the agency contracts. On the contrary, the record shows that since the plaintiff commenced business every one of the 32,000 agencies of the companies other than these three had been established. During all of its 30 years of existence the plaintiff had succeeded in establishing but 6,000 agencies. The suggestion that its contracts tend to monopoly is made by the defendant in the interest of its new contract with the McCall Co., a concern which has come into being and has established some 12,000 agencies in spite of the restrictive covenant in the contracts which the plaintiff has in the meanwhile been making with its much smaller number of agents.

In the face of the experience of 30 years it is absurd to claim that the plaintiff's contracts with its local dealers tended to lessen competition or to create a monopoly or that there is any likelihood of their having such tendency in the future.

It is indeed manifest that the very fact that the exclusive covenant exists in nearly all of the 46,000 agency contracts of the plaintiff's competitors, which is in accordance with the almost universal custom of the pattern trade, has prevented and must continue to prevent the acquisition of any monopoly by the plaintiff or any other company.

III

The Reason for the Custom of Restricting Local Dealers to one make of Patterns and its Advantages

The plaintiff sells its patterns direct to the public to a considerable extent, partly at its sales rooms and partly by a very considerable mail order business. In the sales thus made direct to the public, the plaintiff does not undertake to impose any condition whatever on the purchasers (p. 48).

The custom of pattern manufacturers to stipulate with the local dealers handling their product that the latter should not sell during the term of the contract with one manufacturer, any other make of patterns, grew out of the peculiarities of the pattern business. Upon this point the plaintiff's president testified at the trial, and no attempt was made to contradict his testimony.

Patterns are a very perishable article. They are made in a great variety of styles of which a considerable proportion changes very quickly. Of those made by the plaintiff some 1200 different styles are current at the same time and about 60 new styles are produced each month. Each style is cut in different sizes, the number of which on the average is seven. Each local dealer should carry at least two sizes of nearly all the styles (pp. 34–35). It follows that a large stock of one make of patterns necessarily occupies a given space and that dealers, having only a limited space which can be devoted to patterns, would have to devote substantially double the space to two makes of patterns that is required to handle one, since the supply cannot be restricted to one-half as many of each make as would naturally be carried of one make

alone, without rendering the stock altogether inadequate as to each kind (p. 46).

The testimony showed that the custom of the pattern business by which local dealers or agents are restricted to one kind of patterns has subserved the interests not only of the parties to the contracts, but of the public as well. The plaintiff's president testified at some length upon this point (pp. 45–48) and he was not contradicted. The defendant called as one of its witnesses an expert (Rotheroe) in the employ of the McCall Co., the beneficiary of the defendant's breach of contract in this case, and if the facts were not as stated by Mr. Scanlon, it is fair to assume that testimony in contradiction would have been elicited from this witness. As has been said, patterns are not articles of which the retailer may advantageously carry two stocks, as each stock must contain substantially all of the very numerous styles and the carrying of two kinds of patterns results in practically doubling the retailer's expense with reference to patterns without increasing his sales. If the agencies are not exclusive in the sense referred to, the manufacturer must stand the additional cost incident to the necessary maintenance of more agencies and the obligation to take back more unsold patterns. The result of these conditions is that the public must pay the higher prices necessary to cover the increased expense of manufacturer and dealer.

For example, in the ordinary town of 10,000 inhabitants there are 5 or 6 stores each of which handles a different kind of pattern. The evidence shows that the total amount of pattern business would not be increased if each of these 5 or 6 stores handled all the patterns made, but on the contrary there would be an enormous waste to the manufacturer and to the local dealers and a substantial increase in cost to the consumer, who must

necessarily in the end pay the increased expense of transacting the business (pp. 45–46).

There was no evidence that anybody would benefit by the elimination of the exclusive feature from pattern agency contracts, or that its presence has worked hardship to anyone in the past.

IV

The Nature of the Contract now before the Court

The contract admittedly has some of the elements of sale, but the agency features so predominate as to determine the real nature of the contract. It establishes, as its language reads, "an Agency for the sale of Standard Patterns" (p. 158). *Its object is not to sell patterns to the local dealer, but to sell them through the local dealer to the public.* If they are not so sold the dealer *must* return them and the manufacturer *must* take them back at the expiration of the contract. While the dealer gets an interest in the patterns, he does not get full title. The only use which he can make of the patterns is to sell them to the public or return them to the plaintiff. His rights are strictly limited also as to duration, for they cannot extend beyond the termination of the contract period. If the patterns have not then been sold they must be at once returned and his interest in them ceases. He is not a mere vendee but is an agent bound to promote the plaintiff's interests in various ways. His duties to the plaintiff are by no means fulfilled upon payment of the price stipulated to be paid for the patterns.

That the contract in the present case is in substance one of agency is plain from a consideration of its provisions. While it is true, that with the limitations above described the agent "purchases" the patterns, the plain-

tiff nevertheless retains an interest in them so long as they remain unsold in the possession of the agent. It is obliged to take back during two periods of each year, at 90 per cent. of the cost, such of them as are discarded, and to take back at the expiration of the contract, at 75 per cent. of the cost, all that remain unsold, and the agent agrees unconditionally to return all that are unsold. By virtue of these provisions the ultimate financial result to the parties cannot be determined until the termination of the relationship and the ascertainment of the value of the patterns remaining on hand, and throughout the entire contract period the two parties are mutually interested in what is really a joint commercial enterprise. The relationship between them is obviously entirely different from that ordinarily existing between vendor and vendee.

The interest of the manufacturer in the development of the business, and particularly in having its patterns sold through the agent to the public, is safeguarded by the various provisions of the contract by which the agent obligates himself to promote the manufacturer's interests. Thus the agent agrees to buy a quantity of fashion sheets and handy catalogues annually for free distribution, to keep the pattern stock up to a certain minimum at all times, to "pay proper attention to the sale of Standard patterns" and "conserve the best interests of the agency at all times" and "re-order promptly all patterns as sold"; and he further agrees to "give the department a prominent position on the ground floor of the store" and not remove the agency "from its original location without the written consent of the manufacturer"; and to permit the manufacturer to "take account of the pattern stock whenever it desires"; and he agrees to return promptly at the expiration of the contract all patterns remaining unsold. Fifty per cent. of the purchase price

of the original stock of patterns shipped to the agent remains unpaid as a "standing credit" throughout the period of the contract, and at the end of the period is not liquidated in cash, but by the return of the patterns remaining on hand. These features of the contract differentiate it from one of sale and give it the distinguishing characteristics of an agency contract.

In the case at bar the defendant itself treated the contract as constituting an agency and not a sale, for when it wrongfully undertook to terminate the contract, it returned all the unsold patterns to the plaintiff (p. 68).

The Statute

Section 3 of the Clayton Act (Act of Oct. 15, 1914, c. 323; 38 Stat. 731) is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

B. The Law.

I

The Reasons for asking this Court to review the Case

It is submitted that there is unusual justification for the submission in this case of a petition for a writ of certiorari.

The effect of the decision below is to strike down, as being illegal upon their face, practically all of the 52,000 pattern agency contracts in this country as well as thousands of similar contracts in other lines of business.

This court is not asked to reverse decisions below on questions of fact arising upon conflicting evidence, for there were no such questions. The facts were not in dispute. The sole question was whether they showed that this contract fell within the prohibitions of section 3 of the Clayton Act, or whether on the other hand no violation of that section was shown. Assuming the contract to be one of sale, the question now is in its essence simply this: Is the last clause of the Clayton Act to be given any effect, or are contracts containing a restrictive clause of the sort described to be condemned upon their face without reference to the surrounding circumstances?

The decisions of the courts below, if allowed to stand, will lead to litigation everywhere. The division of opinion in the Court of Appeals, the failure of the majority to give any effect to the last clause of the section, and their decision that in spite of *Willcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, the contract is one of sale to which the statute is applicable rather than a contract of agency to which it is not applicable, will prevent the decision from being accepted as final anywhere.

Furthermore, the majority of the Court of Appeals, in attributing to this contract the presumptive effect of substantially lessening competition within the meaning of the statute, has departed from the views expressed almost universally by other courts both state and Federal with reference to the effect upon competition of contracts of this character and their *prima facie* legality.

The great importance to the business world and to the profession of an authoritative decision with reference to contracts such as this, coupled with the difference of opinion exhibited in the court below and the apparent conflict between the decision of the majority and the hitherto prevailing judicial opinion, justifies, it is submitted, a request to this court to review the case.

II

There was no Evidence that the Contract tended to substantially lessen Competition or to create a Monopoly within the Meaning of the Clayton Act

In the complete absence of evidence showing that the contract in question had or might have any substantial effect upon competition, the decision of Judge Johnson in the District Court and that of the majority of the Circuit Court of Appeals amounted to a ruling that the contract was illegal upon its face.

As Judge Brown pointed out in his opinion dissenting from the majority view (p. 200):

> "The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden

> is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded."

The majority opinion on the other hand erroneously states the question as if the burden were on the plaintiff to prove that the contract might not restrain competition:

> "The plaintiff admits that the only way of escape from the condemnation of the statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' No such finding can be made" (p. 193).

The plaintiff made no such admission. In the first place it contends now, and has contended at every stage of this case, that the contract is one of agency to which the statute has no application. This point is discussed later. If the contract is to be treated as one of sale within the meaning of the statute, the plaintiff denies that the burden of proof rests on it to establish its legality, but maintains that the question before the court was whether the evidence justified an affirmative finding that the particular contract in question, under all the actual conditions existing at the time, tended to the suppression of competition or the creation of a monopoly within the meaning of the statute.

Full weight must, as Judge Brown says (p. 196), be given to the final clause of section 3 of the Act:

> "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemna-

tion of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monopoly competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monopoly to place its goods in the shop of every competitor" (pp. 198–199).

In the Clayton Bill as originally reported to the House of Representatives (63d Congress, 2d Session, Report No. 627; Plaintiff's Exhibit 15) the subject matter of the present section 3 was contained in section 4, which read as follows:

SEC. 4. "That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court."

This section was passed by the House as reported (H. R. 15657). It was thereafter reported to the Senate (63d

Congress, 2d Session, Report No. 698; Plaintiff's Exhibit 16) in the following form:

> SEC. 4. "That it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented for use, consumption, or resale within the United States, or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller."

The language from the House and Senate reports, quoted by Judge Anderson in his opinion (pp. 191–192) relates exclusively to the bill as reported containing these drafts of section 4, which made all contracts of the kind referred to invalid whatever their effect might be.

The Senate rejected section 4 as reported and passed the bill with the following section substituted:

> "That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents, the effect of which will be to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee, or licensee to acquire from the seller, lessor or licensor, or his nominees any article or class of articles not protected by the patent; and any such condition shall be null and void as being in restraint

of trade and contrary to public policy. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the court" (Congressional Record, pp. 15, 574–577).

The House of Representatives disagreed with the Senate amendments and the bill went to conference as a result of which the Act in its present form was evolved, agreed to and became law.

It will be observed that the change made by the conference committee, in framing section 3, with the limitation contained in the last clause thereof, is of great significance, and not as the majority said, "of little or no significance" (p. 193), for the reports relied upon by the majority dealt with provisions which did not contain such a limitation.

The history of the legislation shows, as Judge Brown says, that Congress intended by the final clause of the section "to prevent the disturbance that might result to long-established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect."

The only facts appearing in evidence which could be claimed to bear in any way upon the question of monopoly, were the facts concerning the ownership by the holding company of the shares of stock of the plaintiff, the Butterick Publishing Co. and the New Idea Co., and the fact that the three companies together have about 20,000 agents in United States out of a total of 52,000 pattern agencies (p. 131). But as has been pointed out, there was no evidence that this relationship between the

companies, which has existed for nearly twenty years (p. 132), had restrained competition even as between themselves. On the contrary, it appeared that the business of the three companies has been and is carried on entirely separately and that there are no agreements between them (p. 104). There was no evidence that the ownership of the stock by the holding company has resulted, either with or without the aid of these exclusive agency contracts, in any suppression of competition or tended to create a monopoly, or that there *might* be any such result or tendency. On the contrary, it appeared that various new competing companies have been organized during this period and have acquired a large share of the business, that competition has grown more and more severe, and that the McCall Co. which induced the defendant to break its contract with the plaintiff is the largest company of all (pp. 51–55). In fact, as against the 20,000 agencies of the plaintiff and the Butterick Publishing Co. and the New Idea Co. the other competing companies have succeeded in securing 32,000. Legitimate business reasons for the existence of the exclusive clause in agency contracts are to be found in the nature of the patterns and the pattern business and were shown by evidence not contradicted. Yet Judge Johnson and the majority of the Court of Appeals struck down this particular contract, not by reference to any evidence of an illegal tendency, for there was none, but merely because of the holding company and speculative theories as to what might happen if certain imagined conditions should arise.

The grounds of Judge Johnson's decision were thus stated by him (pp. 20–21):

> "The contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the system. There are in the United States and Canada

about fifty-two thousand (52,000) so-called pattern agencies, and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000) with all of whom a contract like the one we are considering is in force.

The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.

. . . . . .

If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village."

It thus appears that the decision is really based on the fact that by this contract the plaintiff established a monopoly in the defendant's store and that a complete monopoly would result *if* the plaintiff could make similar contract with all other stores.

To the same effect is the conclusion stated by the majority of the Circuit Court of Appeals as follows (p. 194):

"On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern companies control approximately two-fifths. The restric-

tion of each merchant to one pattern manufacturer must in hundreds, perhaps thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act."

It does not appear what "facts peculiar to the business" were in the minds of the court, nor what is meant by "conditions already achieved under such restraint." Nothing appeared in evidence with reference to the character of the business except the facts above referred to (pp. 23–25, *supra*), which have made it of advantage to manufacturer, dealer and public that the dealer should handle only one make of patterns and which have led to the almost universal custom of the business by which the dealer is so limited. As to the "conditions already achieved under such restraint," there was no evidence whatever, as has been pointed out, that this method of doing business has had any effect in lessening competition or preventing new companies from entering into the field or that it has caused any pattern company to

have difficulty either in Boston or anywhere else in establishing a proper agency. All of the other pattern companies except the Butterick Publishing Co. have begun business since the plaintiff, and have established their thousands of agencies in the face of the plaintiff's exclusive contracts.

The suggestion in the majority opinion (p. 194) that there must be hundreds, perhaps thousands, of small communities in which such an absolute monopoly might be effected is purely fanciful, as it did not appear in the testimony that any pattern company has ever established or could possibly afford to establish an agency in any community so small as to have only one store. As there are, according to the census of 1910, over 132,000 cities, towns and villages in the United States, it is obvious that not many of the plaintiff's 6,000 agencies are likely to be located in villages of only one store. It must be borne in mind, too, that in this case the question is not as to the validity of a contract with a dealer in a small town or of any other hypothetical agency contract that might be made, *but as to the validity of this particular contract between the plaintiff and the defendant under the actual conditions existing in Boston and in the trade.*

It is to be noted that the contract in question does not restrain the defendant from selling other kinds of patterns *anywhere,* but merely prevents its selling them at its store in Boston. It may well have another store or stores in other cities and if so it is free to sell other patterns there. In other words, there is no agreement on the part of the defendant that it will not "deal in the goods . . . of a competitor or competitors" of the plaintiff, as prohibited by the Act, but merely an agreement not to sell them in this particular store.

If it were a fact that the plaintiff had a contract with the only merchant in a community, with this negative

covenant in it, and therefore a monopoly of the pattern business in that community, such fact would have no relevancy or bearing on the question as to whether this particular contract in Boston substantially lessened competition or tended to create a monopoly.

It is submitted that Judge Johnson and the majority of the Court of Appeals did not proceed in accordance with the principles stated by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238:

> "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

In the present case the courts below did not consider at all the uncontroverted facts revealed by the history

of the business, with respect to the growth of new companies, the increase of competition and the absence of monopolistic profits under the régime of contracts like this; nor did they consider the reasons furnished by the nature of the business for the conclusion that these contracts are advantageous to all parties, including the public, and that self interest will preclude a manufacturer from seeking to monopolize the possible agents in a given locality. No consideration whatever was given to the actual conditions existing in Boston at the time of the making of this particular contract or at the time of its breach. Those conditions were such that obviously the contract between the plaintiff and the defendant *cannot* have had any effect upon competition. When the defendant broke its contract, the plaintiff had one other agency contract in Boston, that with the R. H. White Co., in which it had agreed that it would not establish any other agency within a quarter of a mile of the White store, except that with the defendant (pp. 50–95). The territory thus delimited covers the "shopping district" of Boston (p. 50), and includes "everybody that competed in the trade" (p. 95). Wholly apart from this, any effort on the part of the plaintiff to take steps in the direction of monopolizing trade in Boston would have been met at the outset with the obstacle that all the other available stores had existing contracts with other pattern companies (pp. 55, 57, 100).

The evidence shows that twelve pattern companies had agencies in Boston and its suburbs and that all the principal companies, except the Peerless, had one or more agencies in prominent stores in the retail district of Boston (pp. 113–115). There is no evidence whatever that any pattern manufacturer has ever had difficulty in establishing a proper agency in Boston, or, indeed, anywhere in the country, or that as a matter of fact there has *anywhere*

been any lessening of competition or monopolization of the business.

The question presented upon this record is whether, because of the use of the word "may" in the last clause of section 3, Congress intended the courts to strike down any contract which might, in some imagined state of affairs, tend to monopoly, without any evidence that that state of affairs had ever existed or was likely to arise and without any consideration of the nature of the business, the purpose of the particular contract, its effect in the past and the reasonable probabilities as to its effect in the future.

Judge Brown in his dissenting opinion answers this question in the negative. It is submitted that the views expressed by him are sound:

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'
>
> In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the city of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the court to make a reasonable prediction of consequences. . . I am of the opinion that this court should not upon this record and upon so incomplete a state of proofs determine the invalidity of this contract. . . . I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, competition is very active" (pp. 198, 199, 201).

III

The Decisions of the Courts below give an Effect to Section 3 of the Clayton Act which in view of the State of the Law at the Time of its Passage Congress cannot have intended

Before the passage of the Clayton Act contracts of this character were frequently assailed as being in restraint of trade, either at common law or under the Sherman Act or state anti-monopoly statutes, and the view taken by the courts with practical unanimity was that they did not restrain trade. Congress knew that this had been the generally accepted judicial opinion, and consequently there was an effort originally to enact legislation that would have made all such contracts illegal on their face. By adding the last clause of the section Congress declared that the contracts should not be bad on their face, but should be condemned only if they had a tendency toward substantial restraint of competition or monopoly. Decisions prior to the statute that *prima facie* no such effect is to be attributed to such contracts are clearly persuasive as showing that in cases under the Act there must be some substantial affirmative evidence to justify condemnation of any particular contract.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, the court had under consideration a so-called profit-sharing scheme of the Corn Products Co. by which the Company agreed to give to its customers a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year provided that during such time they made all their purchases of glucose and grape sugar from the Company. The alleged illegality of a contract to this effect which

the Corn Products Co. had made with the defendant was set up by the latter in defense of an action by the Corn Products Co. to recover the price of certain glucose sold the defendant. It appeared that the Corn Products Co. was a combination composed of all the manufacturers of glucose in the United States. In delivering the unanimous opinion of the court Chief Justice White said (pp. 172–173):

> "The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and a clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Cole Motor Car Co.* v. *Hurst,* 228 Fed. 280, 284 (C. C. A. 5th Circ.), the court held that a contract between a manufacturer of motor cars and a dealer was valid under the Sherman Act and under the anti-trust law of Texas, saying:

> "He [the dealer] was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the per-

> fectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements . . . There surely then has been no restraint of this trade."

When the case came before the court a second time Batts, Circuit Judge, who had not participated in the former decision said (at p. 832):

> "The part [of the contract] which was claimed to be obnoxious to the Texas law appears to be a reasonable provision, almost essential to efficient marketing of the company's products."

Tillar v. *Cole Motor Car Co.*, 246 Fed. 831, 832.

See *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454 (C. C. A. 8th Circ.).
In re Green, 52 Fed. 104 (C. C. S. D. Ohio).

The validity, at least prior to the Clayton Act, of pattern agency contracts in substance identical with that involved in this case cannot be questioned. State courts of the highest repute have not hesitated to sanction the issue of injunctions restraining the local agent or dealer from selling the patterns of other manufacturers than the one to whom he was bound by contract.

Butterick Publishing Co. v. *Fisher*, 203 Mass. 122.
Standard Fashion Co. v. *Siegel Cooper Co.*, 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121.
Butterick Publishing Co. v. *Rose*, 141 Wis. 533.
Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich. 158.

The validity of contracts of this character is shown by many other decisions collected in Davies' Trust Laws and Unfair Competition, pp. 410 *et seq.*

See *Brown* v. *Rounsavell*, 78 Ill. 589.
Southern Fire Brick & Clay Co. v. *Garden City Sand Co.*, 223 Ill. 616.
Ferris v. *American Brewing Co.*, 155 Ind. 539.
J. W. Ripy & Co. v. *Art Wall Paper Mills*, 41 Okla. 20.

In the case last cited the court said (at p. 23):

> "An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.
>
> A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce."

That pattern agency contracts like that in the case at bar have not been regarded by the courts as being *prima facie* in restraint of trade or competition is shown by the fact that they have been sustained many times as against attacks based on the anti-monopoly statutes of different States, some of which are most sweeping in their condemnation of any agreement tending toward monopoly.

Thus in *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122, it was held that the contract of the Butterick Company, which was substantially identical with the con-

tract of the Standard Fashion Co. now before the court, was not illegal under the provisions of R. L., c. 56, s. 1, which is as follows:

> "A person, firm, corporation or association of persons, doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons; but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise."

Pattern agency contracts have uniformly been sustained by the New York courts, notwithstanding the provisions of Laws of 1899, c. 690, s. 1, to the effect that:

> "Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy, illegal and void."

With reference to the similar New York statute of earlier date (Laws of 1893, c. 716), Judge Ingraham, speaking for the court in *Walsh* v. *Dwight*, 40 App. Div. 513, said (at p. 517):

> "This Act did not have the effect of preventing a manufacturer from fixing the price at which his articles should

be sold, or from making an agreement with those persons who acted as the jobbers or retailers of his manufactured articles that they would deal exclusively in his merchandise, or would not sell the merchandise of other persons at a less price than that for which his product was sold."

In *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.*, 171 Mich. 158, a case like the present, the contract was held not to violate the provisions of Act No. 329 of the Public Acts of 1905, the first two sections of which read as follows:

SECT. 1. "All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

SECT. 2. "All combinations of persons, co-partnerships or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void."

In *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67, it was held that a pattern agency contract of the Standard Fashion Co. precisely identical in the provision under consideration with the contract in the case at bar was not void as being in restraint of trade, either at common law or under the state statute relating to trusts and combinations, which makes unlawful any agreement to regulate or fix the price of any commodity or to fix or limit the amount or quantity to be sold in the State. (See Ill. Rev. Stats., sec. 269*a*.)

In *Sullivan* v. *Rime*, 35 S. Dak. 75, an action was brought to recover the price of patterns sold by plain-

tiff's assignor (the Home Pattern Co.) to the defendants under an agency contract by which the defendants purchased the patterns and agreed not to offer for sale any other make of patterns. The case came up on demurrer and it was held that the demurrer was properly overruled. The court said (at p. 77):

> "The contention of appellants is that said contract, by reason of the provisions therein contained that defendants should not offer for sale any other make of patterns, is void and contrary to the provisions of c. 224, Laws of 1909, prohibiting monopolies. . . . There may be some serious question, considering the provisions of said contract as a whole, whether it is in fact an agency or a sales contract. But, as we view the case, it is not material to a determination whether it be held an agency or sales contract, as the result would be the same in either case. We are of the view that the provisions of said c. 224 have no application and were never intended to cover or include any of the questions here presented. The Home Pattern Company had the right to sell and to have sold its merchandise in this state, and had the right to procure an agent or purchaser to deal in and handle its patterns, obligated and bound by contract not to offer for sale or sell other like patterns for other parties. Whether treated as an agency or sales contract, there is nothing therein which, in the slightest degree, tends to the creation of a monopoly, or which in any manner tends to interfere with the right of any other persons to offer for sale or sell like merchandise of other makes in direct competition with the sales under the contract in question. So far as any provision of this contract is concerned, the whole world was theirs; the only limitation being that other persons handling similar patterns could not secure defendants as agents or purchasers during the continuance of the contract in question. The defendants, if they purchased said merchandise outright, did not purchase the same as consumers thereof; but purchased the same for resale to consumers. Under

such circumstances, we are of the view that the Home Pattern Company had the legal right to enter into a contract with defendants obligating them not to handle like patterns for other parties. There is no unlawful combination or monopolistic trust in such transaction, and this wholly regardless of whether or not such patterns were patented or copyrighted."

The same result has often been reached in cases involving similar contracts concerning other articles than patterns.

See, for example:

Walter A. Wood, etc., Co. v. *Greenwood Hardware Co.*, 75 S. C. 378.

Staroske v. *Pulitzer Publishing Co.*, 235 Mo. 67.

W. T. Rawleigh Med. Co. v. *Osborne*, 177 Ia. 208.

Rose v. *Gordon*, 158 Wis. 414.

In the first of these cases the plaintiff sued for the price of certain mowers, rakes, etc., sold under a contract which provided that the defendant would not "accept the agency for, or sell, any other mower, hayrake," etc. "during the term of this contract." The defendant contended that the contract was invalid under the following statute (Code of Laws of South Carolina of 1902, Vol. 1, sec. 2845):

"All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations

designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premium or prices, or seeks to control in any way or manner such tariff, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

The court held that the contract was valid, saying, at page 385:

"It is one of those minor contracts in partial restraint of plaintiff's right to freely sell and the defendant's right to freely buy which the common law would hold to be reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly. . . . It is the agreement of a single independent manufacturer and a single independent dealer and not monopolistic in its tendency. The contract leaves room for the keenest competition in that community by manufacturers and dealers of similar implements. There is nothing in the complaint to show that defendant is the sole dealer in that kind of implement in that community or that the needs of the public could not be reasonably met by other dealers in similar implements."

It will be noted that the South Carolina Statute, like the Clayton Act, invalidates a contract which "tends" to lessen competition, and consequently the decision strongly supports the plaintiff's contention in the present case.

So, in *Rose* v. *Gordon*, 158 Wis. 414, which was a bill to enjoin a breach of a covenant in a lease to sell only the plaintiff's beer, the court held that there was no violation

of section 1747*e* of the Statutes of Wisconsin, which invalidates every contract "in restraint of trade or commerce" and every "attempt to monopolize any part of the trade or commerce in this state." The court said (at p. 416):

> "The restraint of trade resulting from the agreement being partial only and not operating to the prejudice of the public by unduly restricting competition, the contract is not an illegal contract in restraint of trade within the provisions of sec. 1747*e*, Stats."

The foregoing decisions show the state of the law at the time of the passage of the Clayton Act. While Congress obviously intended to change the law by the enactment of section 3, as is pointed out by Judge Anderson (p. 190), it did not intend to stamp with *prima facie* illegality contracts of this nature which had been regarded as harmless in the past, but merely to provide that they should be unlawful *if* they tended to substantially lessen competition or create a monopoly, and if the fact that they did have this tendency in any particular case were fairly proved by a preponderance of evidence.

IV

The Contract is in Reality one of Agency to which Section 3 of the Clayton Act is not applicable at all

If the object of the contract was in substance to establish a local agency for the sale of the plaintiff's product, section 3 of the statute has no application. This is conceded by every one.

In the reports of the judiciary committee on the Clayton Bill, above referred to (pp. 31–32, *supra*) are these statements:

"Section 4 of this bill has apparently been much misunderstood, and great confusion seems to have arisen in regard to its provisions. Whether designedly or from a misunderstanding of its purport, we know not, but it has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies properly so termed. . . .

The local dealer is required under the contract system to purchase and pay for each article secured for his business . . . If he cannot sell the commodity so purchased, he must go out of business. . . . The selling agencies are not in reality agencies at all, but are purchasers and owners of machines who have paid the full price therefor and the contracts condition that these same dealers will not deal in the machines of any competitor or rival company. . . . We have penalized this practice under the provisions of section 4."

From these reports, which had reference to the section in its earlier forms (see p. 32, *supra*), it is obvious that Congress was aiming at contracts of a different nature from the present. The kind of contract which it meant to make criminal were contracts of sale under which the vendee acquired the absolute ownership of the goods sold and was in no sense the local agent of the manufacturer. If this was the intention of Congress with reference to the original bill it is plain that the milder provision actually enacted was not intended to have a broader application.

It is submitted that the contract in question created a local agency for the sale of the plaintiff's product and that in spite of the fact that a limited interest in the patterns passed to the agent the contract was not one of sale within the meaning of section 3. The contract is in substance one for the rendering of service to the plaintiff,

not for the sale of goods to the defendant. The only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff. It was subject to the control of the plaintiff, so far as the pattern business was concerned, in a variety of ways. Thus it was bound to give the pattern department a prominent position on the ground floor of its store and not to remove the department from its original location. It was further bound to purchase for free distribution specified quantities of the plaintiff's advertising publications, to pay proper attention to the sale of the patterns, to reorder all patterns that were sold, to conserve the best interests of the agency at all times, not to sell the patterns except at label prices and to permit the plaintiff's representative to take account of the stock whenever it desired. Twice a year the defendant had the privilege of returning discarded patterns at nine-tenths of their cost and upon the termination of the agreement it was bound to return all patterns remaining on hand for which it was to receive credit at three-fourths of their cost. All these provisions, coupled with the provision with reference to the "standing credit" to be maintained throughout the period of the contract, show that the contract was intended in good faith to create a local agency for the sale of the plaintiff's patterns and that it is not in any sense properly described as a "contract for sale of goods" within section 3.

The agreement not to handle other kinds of patterns was required of the defendant, not as a condition of the sale of goods to it, but as a condition of its appointment as one of the plaintiff's local representatives. Without entering into the contract at all it could have bought from the plaintiff all the patterns it wanted and the purchases would have been subject to no conditions whatever.

That the present contract is one of agency (as it was held to be in *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67) would seem to be conclusively established by the decision in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing*, 141 U. S. 627. In that case the court had before it a contract very much resembling the contract in the case at bar. The Willcox & Gibbs Co. had appointed Ewing its "exclusive vendor for its sewing machines" in a certain territory and had agreed among other things to sell him its sewing machines at 60 per cent. discount from its retail price list, with the privilege of buying back at the termination of the original term such of the goods sold Ewing as it might select. There were various provisions similar to those in the Standard Fashion Co. contract, but there was no obligation on the part of the Company to take back any machines upon the termination of the contract. The question before the court was whether the contract was one of agency which the principal could terminate, or a contract of sale as was contended by Ewing. It was held that Ewing was an agent. Mr. Justice Harlan, speaking for the court, said at p. 636:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the Company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. . . . The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would

> induce him to devote his time, attention and abilities to the company's interest. He was still a mere agent to sell such machines as might be delivered to him under the contract."

Judge Brown recognized the authority of this decision and refers to the "long established trade usage of describing such contracts as agency contracts irrespective of the fact that the title to the goods may pass from vendor to vendee" (pp. 200–201). While the majority opinion stated that the present case is "easily distinguishable from the Willcox & Gibbs case" (p. 188), no intimation is given as to the grounds of the distinction. Judge Anderson merely proceeds to say:

> "Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers."

Without pausing to criticise the use of the expression "full title" as applied to the patterns in this case, it is enough to say that Judge Anderson's language fits exactly the situation which existed in the Willcox & Gibbs case, and there seems to be no material difference between that case and this. The contract there provided that the manufacturer would "sell" its sewing machines to the dealer; that if the connection should cease the manufacturer should "have the right to *buy* back of its goods *sold* to" the dealer such as it might select; and that the dealer should "purchase" from the manufacturer a certain amount of goods until 1875. A more absolute title thus passed to the dealer than in the present case, for there was imposed upon the manufacturer no such obligation as exists here to take back its unsold goods at the termination of the agency, yet the court held that Ewing was "strictly" an agent of the company.

With minor changes the contract between the plaintiff and the defendant could have been so worded as to reserve in the plaintiff the entire title until the sale of the patterns by the defendant instead of a reversionary interest contingent upon the failure of the defendant to sell the patterns. In that event the effect of the contract upon competition would have been identical with its effect in its present form, yet admittedly it would not have fallen within the Act. It cannot be assumed that Congress intended to make this immaterial feature the test and stamp the one form of contract with disapproval and not the other.

If a contract between a pattern manufacturer and a dealer, or a similar contract in any other branch of trade, establishes what is in effect a bona fide *local agency for the sale of the manufacturer's product, it is wholly legitimate for the agent to agree not to handle competing goods, and the validity of the transaction under the Clayton Act cannot turn on the chance incident that, technically, a qualified title to the goods, limited both in extent and duration, is vested in the agent.*

V

Such Decisions as have been made under Section 3 of the Clayton Act sustain the Plaintiff's Position

Notwithstanding the great importance of section 3 of the Clayton Act and the multitude of exclusive trade arrangements which must be now in effect in this country, the cases under this section which have thus far been decided by the courts have been very few.

The only cases, at least in the Federal courts, in which

the effect of section 3 has been considered, apart from the case at bar, appear to be the following:

Sperry & Hutchinson Co. v. *Fenster*, 219 Fed. 755 (D. C. E. D. N. Y.).

Elliott Machine Co. v. *Center*, 227 Fed. 124 (D. C. W. D. Mich.).

United States v. *United Shoe Machinery Co.*, 227 Fed. 507; 234 Fed. 127 (D. C. E. D. Mo.).

Coca Cola Co. v. *J. G. Butler & Sons*, 299 Fed. 224 (D. C. E. D. Ark.).

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed. 398 (C. C. A. 2d Circ.).

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed. 206 (D. C. S. D. N. Y.).

This court has not yet had occasion to consider section 3. Although the section was quoted in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517, the court found it unnecessary to "make the application of this statute to the case at bar which the Circuit Court of Appeals made of it."

In *United States* v. *United Shoe Machinery Co.*, supra, and in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, supra (when in the Circuit Court of Appeals), section 3 was naturally held applicable to two of the alleged monopolies which the report of the judiciary committee upon the Clayton bill states were expressly aimed at by section 3.

The United Shoe Machinery Co. case came before the court on a motion to dismiss. The following extracts from the opinion of the court, 234 Fed., at page 149, show the nature of the allegations of the bill:

> "It is charged that by reason of these leases there is no market for anyone inclined to manufacture these or some

of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition and create, in favor of the defendants, a monopoly in that line of commerce.

In addition it is charged in the bill that the New Jersey Company acquired and still owns the capital stock of 56 other concerns, at one time engaged in the manufacture and selling and leasing of some form of shoe machinery or supplies. The bill alleges:

'Thus the control of a complete line of principal and auxiliary machinery used in the bottoming of shoes became vested in one establishment. Before this no one company could supply such a line nor can any company do so now outside the defendants.' "

In the Universal Film Mfg. Co. case, where a license agreement covering moving picture projecting machines provided that the licensee should use only films manufactured by the licensor, the court said, at p. 400:

"The testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void."

These quotations from the only cases (other than the present case) in which contracts have been held invalid under section 3 show that there is absolutely no resemblance between the situation which the courts had before them in those cases and the situation in the present case,

where there is no evidence whatever tending to show that the last clause of the section is applicable.

In the Film case the court took occasion to refer expressly to a prior case in the Southern District of New York, where section 3 was not regarded as applicable "because that case was decided upon a demurrer to a bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared," although the contract upon its face was similar to the contract condemned in the Film case.

The case hitherto decided which most resembles the present case is *Pictorial Review Co.* v. *Curtis Publishing Co.*, supra, where section 3 was held not applicable to the form of contract entered into between the Curtis Publishing Co. and its district agents, providing in substance, among other things, that the district agents should not supply to newsboys or dealers any periodical other than those published by the Curtis Publishing Co. without first obtaining the approval of the latter. Under the contract the district agents were *purchasers* of the Curtis periodicals. Judge Hand points out (p. 210) that the agents were much more than mere purchasers:

> "Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act."

See also *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566 (C. D. S. D. N. Y.), 227 Fed. 46

(C. C. A. 2nd Circ.), a case under section 2 of the Act; and *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed. 335 (C. C. A. 9th Circ.), in which the validity of the Ford Co. uniform agency contract was sustained though without any reference to the Clayton Act.

VI

The Price Maintenance Clause of the Contract is Valid, but the Question of its Validity or Invalidity is not Material

In the majority opinion of the Circuit Court of Appeals it is said (pp. 194–195):

> "To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not raised by the pleadings, nor has it been discussed by counsel. Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide."

The only evidence relating to this stipulation was the testimony of the plaintiff's president with reference to the reason for having this clause in the contracts:

> "It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents around to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time that he carries it on. If the merchant

were threatened with competition from other merchants, in the neighboring town or in the neighboring square, perhaps, in the sale of the same patterns at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block or in the next community. Now, in undertaking to take a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations" (pp. 48–49).

No attempt is being made in the present case to enforce this clause, and it is immaterial whether it is valid or not.

It is submitted, however, that it is valid and that there is nothing in *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, or the earlier cases, to the contrary. In those cases the court was dealing with attempts on the part of manufacturers to control the prices at which their products should be sold by purchasers who had bought the goods from the manufacturers and had paid for them and acquired a complete title.

The present case is distinguishable on two grounds, first, because the defendant was in substance the *agent* of the plaintiff, and, secondly, because the defendant's title to the patterns was only a qualified one.

By the contract now before the court the plaintiff does not undertake to control the prices which members of the public may charge for its patterns, but only the prices which its local representatives shall charge. The local representative is not a purchaser of the patterns in the sense of having acquired complete undefeasible title. He has only a qualified title giving him the right to sell to others, but if he does not sell he must return the patterns to the plaintiff. The plaintiff has a reversionary interest

until the sale of the patterns to the public and until such sale its interest is not divested. It has a right to protect this interest by requiring its agent to maintain retail prices, and there is nothing in the decisions inconsistent with the existence of this right.

VII

Although the Time for an Injunction has expired, the Plaintiff is entitled to Relief in Equity

This was conceded in the opinion of the majority of the Circuit Court of Appeals unless the contract were deemed to be invalid under the Clayton Act.

The right of a pattern manufacturer to an injunction restraining the local dealer from violating its agreement not to handle the patterns of other makers is thoroughly established.

Butterick Publishing Co. v. *Fisher,* 203 Mass. 122.

Standard Fashion Co. v. *Siegel Cooper Co.,* 157 N. Y. 60.

Butterick Publishing Co. v. *Rose,* 141 Wis. 533.

Peerless Pattern Co. v. *Gauntlett Dry Goods Co.,* 171 Mich. 158.

Judge Brown's criticism of *Lumley* v. *Wagner* (p. 199) is belated, as the doctrine that a court of equity will enjoin the breach of a negative covenant in a contract under proper circumstances, although it cannot specifically enforce the performance of the affirmative provisions, is now thoroughly settled in the law. It is as well settled in the Federal courts as anywhere.

Singer Machine Co. v. *Union Buttonhole Co.,* Fed. Cas. No. 12904 (C. C. Mass.).

Goddard v. *Wilde*, 17 Fed. 845 (C. C. R. I.),
Chicago & A. Ry. Co. v. *N. Y., L. E. & W. R. Co.*, 24 Fed. 516 (C. C. S. D. N. Y.).
Harrison v. *Glucose Sugar Refining Co.*, 116 Fed. 304 (C. C. A. 7th Circ.).
General Electric Co. v. *Westinghouse Elec. Co.*, 151 Fed. 664 (C. C. N. D. N. Y.).
Texas Co. v. *Central Fuel Oil Co.*, 194 Fed. 1, 22 (C. C. A. 8th Circ.).
Reece Folding Machine Co. v. *Earl & Wilson*, 205 Fed. 539 (D. C. N. D. N. Y.).
Montgomery Light Water & Power Co. v. *Montgomery Traction Co.*, 219 Fed. 963 (D. C. Ala.).
In re Consumers' Albany Brewing Co., 224 Fed. 235 (D. C. N. D. N. Y.).
Automobile Insurance Co. v. *Guaranty Securities Corp.*, 240 Fed. 222 (D. C. S. D. N. Y.).

In *Javierre* v. *Central Altagracia*, 217 U. S. 502, referred to by Judge Brown, the contract contained no negative covenant, and, in addition, there was an adequate remedy at law.

In the present case, during the pendency of the litigation, to wit, on Feb. 25, 1919, the plaintiff's right to an injunction expired by the termination of the contract period (Opinion of Court of Appeals, p. 189). This did not, however, terminate the plaintiff's right to relief in equity by way of the assessment of damages and the Circuit Court of Appeals so ruled, citing as authority various decisions of this court (p. 189).

It is submitted that the decision of the Court of Appeals upon this point is correct, and that, notwithstand-

ing the fact that the plaintiff cannot have an injunction, it is entitled to have the validity of the contract determined and the case sent back for an assessment of such portion of its damages as it can prove.

VIII

It is therefore respectfully submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the First Circuit to review its decision herein.

ROBERT G. DODGE,

Attorney for Standard Fashion Co., Plaintiff and Petitioner.

CHARLES E. HUGHES,
HERBERT NOBLE,
JAMES B. SHEEHAN,
ROBERT G. DODGE,
Of Counsel.